SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ARKIN KAPLAN RICE LLP,

Plaintiff,

- against -

HOWARD KAPLAN, MICHELLE RICE and KAPLAN RICE LLP,

Defendants.

Index No. 652316/2012
Hon. O. Peter Sherwood
Part 49

Motion Seq. No. 001

PLAINTIFF'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE MOTION FOR A PRELIMINARY INJUNCTION

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Plaintiff, Arkin Kaplan Rice LLP ("AKR"), submits this Memorandum to reply to the opposition papers submitted by Defendants Howard J. Kaplan ("Kaplan"), Michelle Rice ("Rice") and Kaplan Rice LLP ("KR LLP"), and in further support of AKR's motion for a preliminary injunction.

Preliminary Statement

Everything Defendants have done in response to this motion confirms their strategy to finance their new firm, KR LLP, by using the assets of the law firm in dissolution, AKR. They have blocked payments to the Sublandlord and other creditors in order to accumulate funds in AKR, hoping to obtain those funds for themselves before they are paid to creditors. They have sent out bills in the name of their new firm for work performed while Defendants were partners at AKR and using associates paid by AKR. They have stayed in AKR's premises while refusing to pay rent. And now, consistent with their strategy, they seek to prolong their rent-free period by delaying resolution of this motion -- first, by filing a disqualification motion, and now, in their opposition papers on this motion, by attempting to confuse the issues by littering their papers with irrelevant, inflammatory and demonstrably false allegations.

Their allegations are addressed, and disproved, in the reply affidavit submitted herewith by Stanley S. Arkin ("Arkin Reply Aff."), the affirmation by Lisa Solbakken ("Solbakken Aff.") and the affidavit by Kris Collins ("Collins Aff."). This Reply Memorandum focuses on the facts and law relevant to the relief requested on the motion. When the Defendants' irrelevant allegations and unsupported legal arguments are stripped away, the following points remain, and demonstrate that preliminary injunctive relief is both necessary and appropriate.

- Defendants blocked AKR from paying its rent by refusing to sign rent checks. Defendants' counsel's email puts the lie to Defendants' claim that they never blocked rent payments. In his words: "[W]e do not believe that AKR has any future lease obligations. Mr. Arkin certain is not entitled to use the funds to pay the rent." As for Defendants' conduct blocking a tax

payment and payments to other creditors, Defendants do not even deny it. The Partnership Law requires AKR to pay these obligations. Preliminary injunctive relief is needed to prevent Defendants from continuing to block these payments in pursuit of their strategy to accumulate assets in AKR in the hope that they can obtain those assets before they are paid to creditors.

- It is undisputed that Defendants launched KR LLP on May 17, 2012. Until then, they performed work as partners of AKR, using associates paid by AKR. In their papers, Kaplan and Rice admit they have withheld from AKR their time for April, and admit that they and their associates have withheld from AKR their time for May 1 through May 17. Worse, they now admit, for the first time, that they have actually billed, in KR LLP's name, the work that they did for AKR from May 1 through May 17. Preliminary injunctive relief is needed to compel Defendants to input their time to AKR and to cease billing (and collecting) fees under KR LLP's name for work done by AKR.

- Defendants continue to occupy AKR's space without paying any rent. Although they now say they are willing to make some payment, in fact it has been two full months since they started their own firm, and still they have not paid a penny for using AKR's premises. Their current statement that they are willing to pay (albeit an amount that is far less than their allocable share of rent) comes only in response to this motion. An Order is necessary requiring KR LLP to immediately pay an allocable share of rent from May 17 to the present, and establishing KR LLP's correct allocable percentage of rent -- an amount which, we submit, can be determined on this motion based on the facts in the record.

Below, we address Defendants' factual and legal arguments. None of those arguments in any way undercuts the bullet points above. AKR is entitled to preliminary injunctive relief.

ARGUMENT

I. AKR IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIMS

A. The Lawsuit Is Authorized

Defendants' opening argument is that this lawsuit cannot be maintained because under New York law a majority of partners must authorize the suit, and it was not authorized by three of the four AKR partners. This is a plain misstatement of the law. Under New York law, no such authorization is needed. Partnership Law § 68 states that any partner who has not "wrongfully dissolved the partnership" has the right to "wind up partnership affairs." Consistent

with the Partnership Law, New York courts have held that any partner participating in the wind-up has the right to prosecute an action on behalf of the partnership. In *Yorkes v. Ross*, 142 A.D.2d 642, 530 N.Y.S.2d 590 (2d Dep't 1988), the Second Department considered a case where multiple partners in a dissolved firm sought to prevent another partner from bringing a suit in the name of the partnership to collect a debt. The court held that, because there was no allegation that the partner wrongfully dissolved the partnership, "he was within his rights in prosecuting a collection action on behalf of the partnership." *Id.*, 142 A.D.2d at 642. *See also Stark v. Utica Screw Prods., Inc.*, 103 Misc. 2d 163, 165-66 (N.Y. City Ct. Utica 1980) (in a dissolution, "each partner then has the equal duty and power to do whatever is necessary to collect the debts of the partnership . . . [a] partner cannot bar his co-partner from suing to collect debts due to the partnership.")

The only authority cited by Defendants on this point is a treatise that analyzes the Uniform Partnership Act and states the above-cited principle that "all nonbankrupt partners who have not wrongfully caused dissolution have the *right* to wind up partnership business, unless the partners agree otherwise." J. William Callison and Maureen A. Sullivan, *Partnership Law and Practice: General and Limited Partnerships* § 16:18 (emphasis in original). At the end of the cited section, the treatise states that "in the absence of an agreement to the contrary, the majority vote of partners who have the right to wind up will control." Nothing in the language quoted by Defendants, or even in the cited treatise section generally, addresses whether a lawsuit in the name of a winding-up partnership must be authorized by a majority of the partners. Moreover, if the treatise were read to have that meaning, as Defendants advocate, it would carry no weight here because it would squarely contradict New York authority.

In addition to having no legal basis, Defendants' argument is at odds with their own position about their status with respect to AKR. In an attempt to avoid personal liability under

the Sublease, Defendants claim that they have withdrawn from the partnership. But, when it comes to making partnership decisions, Defendants claim to be full-fledged members of AKR. Defendants cannot have it both ways, and their shifting positions evidence that they simply take whatever stance is most advantageous to themselves in any given situation.

In short, Arkin and Solbakken have the right to bring this lawsuit in the name of AKR. This would be the case even if Arkin and Solbakken did not own a majority of ARK which, as shown in the Arkin Reply Affidavit, they clearly do. (Arkin Reply Aff. ¶ 9)

Defendants further urge the dismissal of all of AKR's "claims at law," on the ground that such claims are improper prior to an accounting. (Defs. Br., at 9.) The short answer is that the claims on this motion -- claims for breach of fiduciary duty and for injunctive relief -- are equitable claims and therefore do not fall within that rule. *See Parnes v. Edelman*, 128 A.D.2d 596, 597, 512 N.Y.S.2d 856, 858 (2d Dep't 1987) ("if one partner has breached a fiduciary duty owed to his other partners, the offending partner may be held to account in an action in equity.").

B. Plaintiff Is Likely To Succeed In Showing Defendants Breached Their Fiduciary Duties by Blocking Payment to Creditors

We showed in our moving papers that Defendants breached their fiduciary duties by causing the Bank to give them approval powers over payments from AKR accounts, and then blocking rent payments to the Sublandlord, tax payments and payments to other creditors. Defendants argue, first, that they did not really refuse to pay the rent; second, that AKR does not really owe the rent because AKR is in dissolution; and third, that their conduct is excusable because of actions purportedly taken by Arkin and Solbakken. None of these arguments stands up to scrutiny.

1. Defendants Blocked Payment of Rent, as Evidenced by Their Own Counsel's Statements

Defendants' contention that they did not refuse to pay rent is not true and is belied by the statements of their own counsel. On June 21, 2012, Defendants' counsel wrote to Plaintiff's

counsel: "As we have said repeatedly, Mr. Arkin is not entitled to use the pre-April receivables to pay rent. Indeed, as a dissolved firm in liquidation (which apparently no longer exists in any event) AKR will not be paying rent." (Affirmation of Howard ("Kaplan Aff."), Ex. M) This repeated the statement Defendants' counsel made in an email sent on June 18, 2012: "As you know, we do not believe that AKR (a firm that apparently does not exist at this point) has any future lease obligations. Mr. Arkin is certainly not entitled to use the funds to pay rent, as you suggest in your email." (Arkin Reply Aff., Ex. F)

Defendants changed their tune only after Plaintiff's counsel informed Defendants on July 2 that Plaintiff would go to Court the next day if Defendants did not agree to the payment. Even then, Defendants conditioned their willingness to pay some of the June and July rent on an agreement "that neither KR not Mr. Arkin's new firm are charged for this rent as well." (Arkin Reply Aff., Ex. I) Arkin and Solbakken could not agree to that condition since it would require giving up AKR's right to be reimbursed for the occupancy of its Premises.[1]

Nor can Defendants avoid liability for their conduct by claiming, as they do, that June and July rent has now been paid. That occurred only as a result of the Court's Order on July 3, 2012. Before then, Defendants blocked AKR from paying the rent, taxes and other third party creditors, and only offered to agree to compromised payments as AKR was going to Court. There is every reason to believe that if they are not enjoined from interfering with payment of the rent and other third party obligations, they will continue to do so, since it is part and parcel of their overall strategy of staying in the Premises as long as possible without paying anything out

[1] Defendants do not even contest that they blocked payment of commercial rent tax as well as payments to vendors. There can be no dispute, therefore, that they have blocked the payment of AKR's due and owing obligations and thus interfered with AKR's statutorily-imposed winding up obligations.

of their pockets, and at the same time accumulating assets in AKR in the hope of obtaining those assets to the exclusion of creditors.[2]

2. AKR Is Obligated To Pay Rent to the Sublandlord

Defendants' position that AKR does not really owe the rent and that Arkin owes it individually has no support in the law or the facts.

a. AKR Is Obligated To Make Sublease Payments

AKR is a tenant under the Sublease and therefore has an obligation to pay the rent, as it has since the Sublease was first entered into in 1999. The rental payments are "liabilities of the partnership" as defined under New York Partnership Law § 71 and, pursuant to that provision, AKR must satisfy that obligation before assets may be distributed to partners. Moreover, a dissolving partnership must provide for the obligation of future lease payments before allowing distributions to partners. *See City Investing Co. v. Gerken*, 200 A.D. 503, 504 (1st Dep't 1922) (corporation dissolved in July 1910, holding a lease that ran through May 1918; landlord obtained judgment for unpaid rent that came due after the dissolution date). *See also Starr v. Fordham*, 420 Mass. 178, 192-93 (1995) (relying on law identical to New York Partnership Law § 71 to hold that partner who had withdrawn from partnership was not entitled to firm profits until all liabilities, including the firm's long term office lease, had been satisfied). Defendants' assertion that AKR "is not entitled to use pre-dissolution receivables to pay rent after the dissolution date of April 1" (Defs. Bf. at 12) thus has no merit. AKR is required to use its assets to fulfill its legal obligations to pay rent to the Sublandlord.

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[2] Defendants' continued willingness to block AKR's payment of Sublease obligations is evidenced by their arguing that it would be "unfair" for AKR to pay its own rent and charge rent to KR LLP. Defendants conflate two separate things: AKR's payment of its own obligations and the obligation of entities using AKR's space to pay for that space. This conflation is the result of Defendants considering AKR's funds to belong to them, in contravention of the established rule that AKR's funds must first go to creditors.

Defendants erroneously assert that that "there is no basis to require any additional payments" from AKR towards the lease because "the firm is *essentially* wound up." (Defs. Bf., at 13 (emphasis added)) Obligations under the lease, just as under all other pre-existing contracts, continue to exist when a partnership dissolves. *See 111-115 Broadway Limited Partnership v. Minter & Gay*, 255 A.D.2d 192, 192 (1st Dep't 1998); *Gran Sabana Corp. v. Midtown Gourmet Food Mkt., Inc.*, 193 Misc. 2d 788, 789 (1st Dep't App. Term 2002) ("Generally, a lease to a corporation is not terminated by the dissolution of the corporation and, unless the lease so provides, the rights and obligations thereunder are not extinguished by the corporation's dissolution."); *PDV (USA) Inc. v. Corbin,* 2005 WL 5959772 (Sup. Ct. N.Y. Cty. December 13, 2005) (considering partnership's "continuing obligations" under a sublease and holding that dissolution did not make partnership "unamenable" to suit for those obligations).

b. Arkin and Solbakken are Not Liable for AKR's Obligations

There is no legal basis for Defendants' assertion that Arkin and Solbakken are "primary obligors" under the Sublease and that AKR therefore need not pay the Sublandlord. The Sublease, initially entered into August 25, 1999, defines the "Subtenant" as a collective that includes AKR as a partnership and the individuals Arkin, Kaplan and Rice. (Arkin Affirmation dated June 30, 2012 ("Arkin Aff."), Ex. C at 1) The sole purpose of the Sublease, of course, is to provide space for the AKR Partnership to conduct its business, and in the 13 years since the Sublease was entered into, all amounts due under the Sublease were paid exclusively by the Partnership, and not by any individual partner of AKR. (Arkin Reply Aff. ¶ 62) Likewise, the extension of the Sublease resulted from a notice provided by AKR which, in fact, was signed by an AKR attorney who was not a signatory to the Sublease. (Arkin Aff. Ex. E.) Plainly, if there is a primary obligor under the Sublease, it is AKR.

Defendants' "primary obligor" argument rests on two aspects of the Sublease: the listing of all individual partners as part of the Subtenant, and the provision that permits any partner except for Arkin to withdraw from the Partnership and be deemed to be released from any further rights or obligations under it (the "Withdrawal Provision"). [3] According to Defendants, the listing of Arkin as part of the Subtenant makes him the "primary obligor" and the "Withdrawal Provision" leaves Arkin as the sole partner obligor under the Sublease.

Neither leg of Defendants' argument holds up. Before the current dispute, no partner -- including Kaplan and Rice -- ever claimed that Arkin, or any other partner, was a "primary obligor" under the Sublease, or was required to contribute to rent payments under the Sublease. (Arkin Reply Aff. ¶ 63) Arkin and Solbakken are no more "primary obligors" under the Sublease than Kaplan and Rice were primary obligors under the Sublease based on their signing the Sublease individually. At most, Arkin and Solbakken, like Kaplan and Rice, are jointly and severally liable for any rent amounts due under the Sublease that are not covered by rent paid by subtenants and cannot be paid by AKR.

Nor is there any merit to Kaplan's and Rice's contention that they stand in a different position from Arkin because they have "withdrawn" from AKR. The Withdrawal Provision does not affect Kaplan's and Rice's liability for unpaid amounts under the Sublease because it requires "withdrawal of [the partner] from the Partnership." Kaplan and Rice, however, had not purported to withdraw from AKR prior to dissolution, and neither legal authority nor common sense supports the concept of withdrawal *after* dissolution.

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[3] The Sublease provides that "upon the admission of any new Partner ("New Partner") to the Partnership, such New Partner shall be jointly and severally liable for the performance of Subtenant's obligations under this Sublease . . . ." and that "upon the withdrawal of any partner (other than Stanley S. Arkin) from the Partnership (hereinafter referred to as a "Withdrawing Partner"), such Withdrawing Partner shall, upon the date of withdrawal from the Partnership (hereinafter referred to as the "Withdrawal Date"), be deemed to be released from this Sublease as of the Withdrawal Date and shall have no further rights or obligations under this Sublease from and after the Withdrawal Date." (Arkin Aff. Ex. B at 28-29)

The AKR Partnership was dissolved no later than May 17, 2012, when Kaplan and Rice began practicing as KR LLP. Up until May 17, 2012, Kaplan and Rice continued to practice as partners of AKR. They purported to "withdraw" from the Partnership only *five weeks later*, in a notice sent to the Sublandlord on June 26, 2012. (Arkin Aff. Ex. H) The express purpose of the notice was to escape liability under the Sublease based on the Withdrawal Provision. (*Id.*)

There is no authority that allows partners of a limited liability partnership to withdraw from a law firm post-dissolution for the purpose of avoiding personal liability. The analogous statutes governing limited partnerships and limited liability companies both prohibit opportunistic withdrawals. *See* New York's Revised Limited Partnership Act § 121-603 ("a limited partner may not withdraw from a limited partnership prior to the dissolution and winding up of the limited partnership."); New York's Limited Liability Company Act § 606(a) ("unless an operating agreement provides otherwise, a member may not withdraw from a limited liability company prior to the dissolution and winding up of the limited liability company.").[4]

For its part, New York Partnership Law provides that "[t]he dissolution of the partnership does not of itself discharge the existing liability of any partner." *Partnership Law* §67(1). This is because the entity remains obligated to its creditors even after a dissolution process is commenced. Accordingly, upon the dissolution of a partnership, the only way for an exiting partner to avoid the personal liability otherwise assumed is to execute an agreement amongst: (i) him or herself; (ii) the remaining partners; and (iii) the partnership creditor. *Id.* § 67(2). That is, only when the partnership creditor and a withdrawing partner's other partners know of and consent to: (a) the partner's exit; and (b) the dissolution, is the exiting partner "discharged from any liability" to that creditor. *Id.* § 67(3). (Emphasis added). The purpose of each one of these

[4] New York LLP law was "enacted . . . as a rider to the New York Limited Liability Company Law. . . ." *See Ederer v. Gursky,* 9 N.Y. 3d 514, 523 (2007).

provisions is plain. They are designed to prevent a partner from engaging in an opportunistic withdrawal or disassociation that operates (intentionally or not) to the detriment of remaining members or partnership creditors.

Such an opportunistic withdrawal is precisely what Kaplan and Rice now seek to accomplish, to the detriment of AKR, its former partners and AKR creditors. There is no precedent at law or equity allowing for this result.

c. AS Is Not AKR's Successor Firm

Defendants' contention that AKR need not pay the rent because AS has represented itself as the successor firm to AKR is not persuasive. As explained in the Solbakken Affirmation, the statement to AKR's insurance broker and insurer about AS being "for present purposes . . . the successor entity under the policy" was made in the wake of KR LLP's announcement that it was commencing its own firm and at a time when AS was in the process of sorting out its status, rights and obligations. Such statements are not binding. *See Morris v. Crawford*, 304 A.D.2d 1018, 1022 (3d Dep't 2003) (court refuses to find that statements by defendant that his firm was the successor to a partnership has legal significance where defendant testified he did not appreciate the legal ramifications of the reference and ceased making the references). This is particularly so here since the statements were not made to the Sublandlord. Moreover, there is nothing to suggest, and Defendants do not argue, that the Sublandlord agreed to release AKR from its obligations under the Sublease and consented to AS taking on those obligations. Such consent would be required for AS to be liable under the Sublease in the place of AKR. *See Goldome v. Bonuch*, 112 A.D.2d 1025, 1026 (2d Dep't 1985) (in the context of an assignment of a lease, the originally liable party remains liable absent the creditor's express agreement to release that party).

In any event, successor liability under a lease is a legal determination, depending on the presence of factors that New York courts recognize as supporting an exception to the general rule against successor liability. As set out by the Court of Appeals, those factors are: "(1) [the successor corporation] expressly or impliedly assumed the predecessor's . . . liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction [was] entered into fraudulently to escape such obligations." *Schumacher v. Richards Shear Co.*, 59 N.Y.2d 239, 245 (1983). The same principles apply to partnerships. *See Graham v. James* 144 F.3d 229, 240 (2d Cir. 1998).

None of these factors is present here. AS has not expressly or impliedly assumed AKR's obligation under the Sublease. There has been no consolidation or merger of AKR and AS. AS is not a mere continuation of AKR; indeed, the owners are not the same. And there has been no claim that the dissolution of AKR was done fraudulently to escape liability under the Sublease. Accordingly, there is no basis for finding successor liability. *See Broadway 26 Waterview, LLC v. Bainton, McCarthy & Siegel, LLC,* 94 A.D.3d 506, 507 (1st Dep't 2012) (allegations that law firm was responsible for rent arrears as a successor firm fail as a matter of law where there was no showing that the *Schumacher* factors were satisfied).

Finally, Defendants cannot make the Sublease obligation go away by contending that the issue can be addressed later in an accounting. AKR has an ongoing obligation to pay rent to the Sublandlord every month. Deferring payment of the rent until an accounting would result in an immediate breach of that obligation.

In short, AKR has an obligation to continue paying rent to the Sublandlord. Defendants' past and threatened future interference with those payments, the tax payment and payments to other third party creditors establishes a valid claim for injunctive relief.

3. Defendants' Attempts to Excuse Their Conduct Based on Allegations About Arkin and Solbakken are to No Avail

The Court should reject Defendants' attempt to excuse their conduct in blocking payment of the rent and other payables by claiming that it is a justified response to conduct by Arkin and Solbakken. Defendants argue that they contacted the Bank for the purpose of preserving assets because they discovered unauthorized use of funds and secret transfers of insurance policies. As Defendants well know, there was no unauthorized use of funds, and the situation on which they base that assertion -- the urgent need, shortly after Defendants started their new firm on May 17, to make payroll payments to employees who had been on AKR's payroll -- was brought about by their own conduct, as was explained to them. As they concede, the funds were repaid. (Kaplan Aff. ¶ 31.) In any event, Defendants' breach of fiduciary duty is not merely in contacting the Bank and changing the terms of the accounts without partnership approval; it is in subsequently blocking payments of rent and other plainly valid obligations of AKR.

The allegations about the transfer of insurance policies have nothing to do with Defendants' conduct in contacting the Bank and blocking payments to creditors. Defendants' other allegations, which likewise are addressed in the Affirmations and Affidavit submitted herewith, also have no bearing on AKR's liability under the Sublease and Defendants' conduct in blocking payments to the Sublandlord and other creditors.

Finally, there is no substance to Defendants' contention that because they do not believe that AKR should pay the rent, their actions in blocking rent payments should be viewed as "efforts to negotiate regarding this issue" and "cannot possibly be a breach of fiduciary duty." (Defs. Bf., at 12) Blocking the payment of due and owing obligations is not "negotiating." Defendants cannot avoid responsibility for their actions by giving their actions benign labels.

C. Plaintiff Is Likely To Succeed In Showing Defendants Breached Their Fiduciary Duties By Failing To Submit Billing Information

AKR is likely to prevail on its claims that Kaplan and Rice have breached fiduciary duties owed to AKR by obstructing AKR's collection of receivables. Defendants admit that while AKR is in dissolution, its partners "owe a continuing fiduciary duty" which includes "the preservation of partnership assets." (Defs. Br., at 11.) Defendants also admit that receivables from the month of April belong to AKR, as Defendants have provided AKR with associate time for April. Finally, Defendants admit that they continue to willfully obstruct AKR's ability to collect April and May receivables by withholding their own time for April, withholding their time and that of their associates (former AKR employees) for the period of May 1 through May 17, and by sending out bills for May time under the name of and for the benefit of KR LLP. Defendants have supported, not refuted, AKR's allegations of breach of the duty to preserve AKR's assets.

In defense of their actions, Defendants argue that "AKR was dissolved no later than March 29th," and therefore that KR LLP and AS "should have begun separate billing as of that date." (Defs. Br., at 16.)[5] While the date of AKR's dissolution is not conceded, here, it does not matter. It is undisputed that, until May 17, 2012 -- the date that KR LLP was launched – every AKR attorney, including Defendants and the associates now working for KR LLP, held themselves out to the world as AKR attorneys. It is also undisputed that until May 17, all of the associates and paralegals now working for KR LLP were being compensated by AKR as AKR employees.[6] By withholding Defendants' own time and by billing professional time for May 1 through May 17, KR LLP is seeking to be paid for work performed by professionals who were

[5] KR LLP did not launch until May 17, and AS was not formed until after May 17. Neither firm could have "begun separate billing" as of March 29, which was over six weeks before either firm came into existence.

[6] Attached to the Collins Affidavit is an email sent on behalf of Kaplan, in which he tells AKR's office administrator that "as of Friday, 5/18/12" the AKR associates and staff who went to work for KR LLP "will be paid by Kaplan Rice." (Collins Aff. Ex. A) Up until that point, those employees were on AKR's payroll.

AKR employees at the time that the work was performed. Without the requested injunctive relief, assets belonging to AKR -- receivables for work performed by AKR employees -- will be usurped by Defendants. Indeed, Defendants admit that they already have misappropriated some of those assets by sending out KR LLP bills for the month of May.

Next, Defendants protest that AKR possesses "almost all" of the withheld time, because AKR's former associates -- though not Kaplan and Rice -- have put their time for April into AKR's billing system. (Defs. Br., at 16, 19.) Far from helping Defendants, this constitutes an admission that AKR should be provided with *all* of the withheld time. By providing AKR with some of the April time, Defendants concede that AKR is owed all of the time for April. The same is true for May 1 through May 17. There is no distinction between the two periods because associates paid by AKR continued to be used to do the client work through May 17. There is no principled reason for releasing some April time, but not other time from April and no time for the pre-May 17 period.

Further, providing AKR with some, but not all, of the April time accomplishes nothing. It does not allow AKR to collect its receivables since it cannot bill clients for April work without all of the withheld time, including the time of Defendants. And, providing some of the April time does not address the period for May 1 through May 17, during which period all of the professionals whose time is being withheld were compensated by AKR as AKR employees.

D. KR LLP Must Compensate AKR for its Use of AKR's Space

AKR's moving papers establish that KR LLP must compensate AKR for the use of AKR's space. KR LLP is responsible for the percentage of AKR's Sublease obligation that is proportionate to the percentage of the space being used by KR LLP. AS is responsible for the percentage of the space that it uses.

AKR has its own subtenants, who occupy part of AKR's space. KR LLP and AS occupy the remainder of AKR's space. (One of the subtenants is a business affiliated with Arkin, but is

separate from AS and it pays its own rent to AKR. (Arkin Reply Aff. ¶ 31.)) Thus, KR LLP and AS should each pay their allocable share of the Sublease liability that remains after applying payments received from AKR's subtenants.

Although Defendants ultimately agree that KR LLP must pay AKR for its use of AKR's space, they begin by arguing that Kaplan and Rice have an unfettered right to use that space. (Defs. Br., at 13-14.) Defendants rely, however, on precedent that, in fact, establishes that they have no right to use AKR's space for their present purposes. In *Londin v. Carro, Spanbock, Londin, Fass & Geller*, 124 Misc. 2d 1013 (Sup. Ct. N.Y. Cty. 1984), the partners in a dissolved partnership continued to use the partnership's office space for their own respective purposes, including the operation of a new partnership by some of them. The court found that the occupancy of the dissolved partnership's offices by the partners was "not 'for partnership purposes'" and not "for the benefit of the partnership in dissolution." *Id.*, 124 Misc. 2d at 1015. For those reasons, the court found that the "occupancy and utilization" of the dissolved firm's leased space "does not come within the meaning of subdivision 2(a) of Section 51 of the Partnership Law." *Id.*[7] The court therefore ordered the plaintiff, a former partner seeking to remain in the dissolved firm's space, to pay a monthly fee for the "cost and expense" of that space. *Id.*, 124 Misc. 2d at 1016.

Here, KR LLP is not using AKR's space for purposes related to AKR or the winding-up of AKR's affairs. KR LLP, with its nine attorneys and several staff members, is operating for its own business purposes. Nor can Kaplan and Rice pretend that they, individually, are occupying

[7] Section 51 of the Partnership Law states that "1. A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership. 2. The incidents of this tenancy are such that: (a) A partner, subject to the provisions of this chapter and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; *but he has no right to possess such property for any other purpose without the consent of his partners*." (Emphasis added.) As is stated in the Partnership Law, a partner holds property as a tenant in partnership, "not tenant in common." *Kraus v. Kraus*, 250 N.Y. 63, 67 (1928).

AKR's space for "partnership purposes." They do not contend to be involved in the winding up of AKR's affairs which, in their view, are essentially already wound up. Moreover, such a position would be inconsistent with Kaplan's and Rice's claim -- made to avoid liability under the Sublease -- that they have withdrawn from the Partnership. While AKR's cause of action to evict KR LLP is not at issue on this motion, the fact that KR LLP has no right to occupy AKR's space underscores that KR LLP, like plaintiff in *Londin*, must compensate AKR for its use of the space, and must do so immediately. [8]

Recognizing the weakness of their legal position, Defendants now state that to the extent KR LLP remains in the space, they are willing to compensate AKR. (Defs. Br., at 15.) Incorrectly, however, they advocate a market-value payment. (*Id.*) *Londin* dictates that KR LLP must pay a monthly fee for the "costs and expenses" of AKR's space. *Londin*, 124 Misc. 2d at 1016. That means that KR LLP must pay an amount of the "costs and expenses" of AKR's Sublease obligations that is proportionate to the amount of AKR's space used by KR LLP, and not some market rate that might be less than those "costs and expenses."

The parties disagree over the method of calculating KR LLP's allocable share of AKR's Sublease obligations, but that dispute can be resolved on the evidence submitted in the respective papers. In their calculations, Defendants improperly attribute to AS space that is occupied by a tenant that is affiliated with Arkin, but which is a separate entity from AS and which pays its own rent to AKR as a subtenant of AKR. (Arkin Reply Aff. ¶ 31.) Under AKR's proposed

[8] In addition to citing *Londin*, Defendants claim that "[o]ther courts" have held that partners may "make continued use of the former partnership's office space." Defendants, however, cite only one case for their proposition – and even there, they mischaracterize the holding of that case. *Merriman v. Town of Colonie*, 934 F. Supp. 501 (N.D.N.Y. 1996) was an action pursuant to 42 U.S.C. § 1981, in which the plaintiff alleged that police officers and others violated plaintiff's civil rights by allowing plaintiff's co-partner in a dissolved partnership to enter the partnership premises, an auto shop, and remove certain property. *Id.* at 505. In dismissing the civil rights claims, the court held that "as long as the partnership remained in existence at the shop," the two partners were "legally entitled to equal access" and that the non-plaintiff partner "was entitled to enter the shop." *Id.*, at 506. The court did not hold, or even consider, whether either partner might operate a new, independent business from that space for months on end, which is the proposition for which Defendants cite that case.

calculation, all monies received from AKR's subtenants, including the subtenant affiliated with Arkin, would be applied to AKR's Sublease obligations, and KR LLP and AS each would pay a percentage of the remaining, net obligation, because those two firms together are using all of the space not occupied by AKR's subtenants. Relying on Defendants' own figures, Defendants occupy nine offices to AS's six offices, a ratio that results in KR LLP paying 60% of AKR's net Sublease obligations. (Defs. Br., at 15) Defendants also admit that they occupy carrels and a file room, in addition to their nine offices. Given Defendants' own admissions regarding their use of 60% of the total offices occupied by KR LLP and AS, and additional carrels and a file room, AKR's proposal that Defendants pay 68% of AKR's net Sublease obligation is reasonable, and should be adopted by the Court.

II. AKR WILL SUFFER IRREPARABLE HARM ABSENT INJUNCTIVE RELIEF

AKR has established that it will suffer irreparable harm absent injunctive relief. The failure to pay the significant monthly Sublease obligations creates an imminent risk of termination of the Sublease, which would lead to eviction and the loss of AKR's opportunity to reduce its Sublease exposure by subletting its space. The failure to provide AKR with billable time is preventing AKR from carrying out its statutory winding-up duties by collecting its receivables, and the delay in collecting the receivables makes them more difficult to collect. The now admitted conduct of KR LLP in sending out its own invoices for work done as AKR and using employees paid by AKR for the period May 1 through May 17 deprives AKR of control over its process of billing and collecting receivables. Moreover, now that Defendants have admitted that they did send out KR LLP invoices for work that was done by AKR, there can be no doubt about the imminent threat that they will do the same for the work done by AKR in April, for which Kaplan and Rice have still not imputed their time. Additionally, AKR requests that KR LLP be ordered to compensate AKR for its use of AKR's leased space, *pendente lite.*

Such relief is appropriate here. *See, e.g., MMB Assocs. v. Dayan*, 169 A.D.2d 422, 422 (1st Dep't 1991) (it is "manifestly unfair" that a party "should be permitted to remain in possession of the subject premises without paying for their use").

Defendants fail to refute these specific allegations, and instead offer conclusory, general statements that are belied by the facts. They argue that the alleged injuries are not "threatened and imminent," are "speculative" and are not "reasonably likely to occur." (Defs. Br., at 17.) In fact, with respect to the Sublease obligations, the Sublandlord can terminate the lease on two business days' notice, and there is no evidence to suggest that the Sublandlord would not take such action if AKR fails to make yet another six-figure lease payment. With respect to the April and May receivables, Defendants admit they are actively engaging in behavior that deprives AKR of the ability to collect those receivables, perhaps permanently. The alleged injuries therefore are "threatened and imminent" -- with some of them occurring right now -- and far from speculative or unlikely.

Defendants state that AKR's injuries are "compensable by monetary damages," but do not explain how termination of the Sublease and eviction are compensable by monetary damages, and it is obvious that they are not. Defendants' conduct in failing to provide billing information, in addition to preventing AKR from conducting its winding-up operations by collecting receivables, and destroying the collectability of those receivables through delay, has rendered AKR unable to put a dollar amount on the receivables. Finally, although AKR does seek monetary compensation from KR LLP for its use of AKR's office space, that type of relief is entirely appropriate on a preliminary injunction, and is granted routinely.

Defendants argue that AKR's injuries related to billing information are "utterly rebutted" because "information on *almost* all of the billable time in question is in fact in the possession of

AKR, Arkin and the AS law firm." (Defs. Br., at 19 (emphasis added).) As Defendants know, AKR cannot send piecemeal bills with missing information to its clients for "almost all" of the time worked on those clients' matters. AKR must wait until all of the billable time for April and May has been input into its system before it can send out bills for those months.

Finally, Defendants argue that AKR cannot be injured because "by definition, AKR cannot suffer irreparable harm in the future because *it is dissolved.*" (Defs. Br., at 18 (emphasis in original).) Defendants offer no authority for this radical position and, in fact, it is contrary to the black letter of New York's Partnership Law, which provides that "[o]n dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed." (Partnership Law § 61.) Though Defendants are now totally focused on their new endeavor of KR LLP, and have no concern for the rights and obligations of AKR, AKR still is in existence and still is capable of suffering injury at the hands of Defendants.

III. THE BALANCE OF EQUITIES WEIGHS HEAVILY IN FAVOR OF PLAINTIFF

We showed in our moving papers that the balance of the equities weighs decidedly in favor of Plaintiff. In the absence of an injunction that, at a minimum, keeps in place the Court's order to continue paying rent, AKR is at risk of default, termination of the Sublease and eviction. Blocking payments to other creditors and withholding time entries is preventing AKR from carrying out the winding up process by collecting its assets and paying its obligations. Also, assets that plainly belong to AKR are being withheld from it, making it increasingly difficult and unlikely that AKR can recover them. Defendants, in contrast, will suffer no harm if an injunction is granted. Any claim they have that assets belong to them can be vindicated in an accounting or subsequent damages action.

Defendants advance only one argument: that AKR will not be harmed by breaching the Sublease because it expects to be wound up after July and it will then no longer be "required" to

pay rent to the Sublandlord. As discussed above, Defendants' premise is incorrect. AKR has an obligation to continue paying rent under the Sublease. It cannot be properly wound up until that obligation is satisfied. What Defendants are really saying is that AKR should skip out on its obligations to the Sublandlord because there will be nothing the Sublandlord can practically do about it. That argument carries no weight in a balance of the equities.

Not surprisingly, Defendants do not even address the harm to AKR from their failure to input their time for work on AKR matters in April and the period May 1 through May 17, and their now admitted billing of KR LLP clients for work done by AKR for the first half of May. The reason is clear: there is nothing they can say.

Conclusion

For the reasons stated here, and in the Affirmations, Affidavit and other papers previously submitted, Plaintiff's motion for preliminary injunction should be granted.

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